Filed 1/31/19 Boykin v. He CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CATALINA BOYKIN, Cross-complainant and Respondent, v. YING HE et al., Cross-defendants and Appellants.	A149020 (San Francisco County Super. Ct. No. CGC-13-531392)

Seller agreed to sell her house to buyer for $350,000, both of them represented by a dual agent. The date for close of escrow came, with buyer not having performed all that was required of her. Efforts to resolve the matter were not successful, and seller canceled the sale. Buyer sued for specific performance, and seller cross-complained against the agent and the listing broker. The matter proceeded to a nine-day trial, following which the jury returned a 16-page special verdict that among other things advisedly granted specific performance. That verdict also found for seller on three of her six causes of action, but awarded little by way of damages, specifically "economic damages" of $0, and non-economic damages in two alternatives: $350,021 "if [seller] has to transfer the property to buyer," and $17,500 if she does not.

Following that verdict, the trial court orally announced that it was prepared to issue a "tentative decision" that would: (1) award buyer specific performance, (2) deny buyer attorney fees, and (3) award attorney fees to seller based on the theory of tort of another, a claim the trial judge had resurrected at trial, despite that 14 months earlier the

law and motion judge had stricken that claim from the third amended complaint on which the matter had proceeded to trial. There followed voluminous briefing on the tort of another issue, briefing that would last for several months.

While the tort of another issue remained in controversy, the trial judge presided over a settlement conference between the seller and buyer, a settlement conference held over the objection of the broker and listing agent—and despite that the trial judge had earlier recognized, on the record, that his participation in any settlement efforts would be inappropriate in light of the substantive issues still before him. Nevertheless, participate he did, effecting a settlement between seller and buyer, the essence of which was that seller agreed to sign a promissory note to buyer for $230,000, payable in 30 years, and seller would retain her home.

Following more briefing and argument on the tort of another issue, the trial judge filed several statements of decision, culminating in a "Final Amended Statement of Decision" that allowed seller to keep the home and at the same time awarded her $350,021, despite the jury's verdict that such amount of damage was appropriate only if seller had to part with the property. The decision also awarded seller $588,938 in tort of another attorney fees, for a total judgment of $938,959.

The broker and the listing agent appeal, asserting various grounds of error they claim result in a judgment against them that is a manifest miscarriage of justice. We agree and we reverse, with directions to enter a new judgment awarding seller $17,500.

BACKGROUND

The Parties and the Participants

The seller of the property is respondent Catalina Boykin. Boykin is a native of the Philippines; she was 69 years old at the time of the sale involved here, 73 at the time of trial. Boykin owned her home on McCarthy Street in the Geneva Terrace section of San Francisco. She also owned a home in the Philippines. Boykin's respondent's brief describes her as having "language difficulties and mental impairments," though the record references supplied do not support that description.

Arturo Quizmundo[1] is Boykin's adult son, a resident of Washington state. He was listed on the title to the home, and thus also signed the purchase agreement. Quizmundo is not a party to this appeal.

Diana Sam is the buyer of the property. She is a lawyer by training who, having left the practice of law, was primarily involved in real estate, purchasing homes to "flip" or rent out. Sam is not a party to this appeal.

Ying "Jenny" He (for consistency with the briefing, Jenny He) is the real estate agent involved in the sale of Boykin's home, who apparently had a broker relationship with Century 21 Realty Alliance (Century 21). Jenny He and Century 21 are the appellants here, represented by separate counsel, though represented by the same counsel below, Mark Koenig.

The Facts

Boykin first listed her home for sale in 2008, through listing agent Connie Logan. Logan marketed the home with signs and on the Multiple Listing Service (MLS), without success, and after several months the home was removed from the market.

In the course of the 2008 marketing effort, Boykin met Jenny He, to whom she apparently took a liking, telling her, as Jenny He put it, she liked her "presentation" and that "if she does want to sell eventually, she will give me a call." Jenny He gave Boykin a business card and thereafter sent her calendars.

On December 17, 2012, Boykin contacted Jenny He and said she wanted to sell her home, specifically telling her that she wanted to move back to her home in the Philippines. And that same day Boykin signed a listing agreement with Century 21 to sell the home.

Jenny He had extensive experience with the real estate market in Boykin's neighborhood, including in the very development in which Boykin's house was located, having sold some 20 homes over a six-year period. Jenny He searched MLS for recent

[1] Quizmundo testified the spelling of his last name as such: "Quizmundo, spelled Quebec, uniform, India, Zulu, India, Mike, uniform, November, delta, Oscar [Quizimundo]." All other transcript references spell the last name "Quizmundo."

comparable sales, and suggested to Boykin that they list the house for $350,000. Boykin agreed.

On December 19, Jenny He arranged for a photographer to photograph the home to put it on MLS. Meanwhile, she knew from her experience of three prospective buyers for the home, and that same day showed the property to two of them. One of them was Sam, whom Jenny He had met within the year, representing her in a real estate deal. Sam told Jenny He she was interested in the home, and asked her if she would lower the price to $325,000. Jenny He refused, saying the price was firm at "350."[2] Sam agreed to buy the home at that amount.

The next day, December 20, Sam signed an offer on a California Residential Purchase Agreement and Joint Escrow Instructions (purchase agreement). That same day Jenny He met with Boykin and discussed Sam's offer, further explaining that in light of Sam's offer they did not need to list the property on the MLS, put up a "For Sale" sign, or have an open house. Boykin agreed, and signed the purchase agreement.

Jenny He testified she told Boykin that she, Jenny He, was acting as a dual agent, representing both her and Sam. And both the listing agreement and the purchase agreement state that Jenny He was acting as a dual agent. However, the dual agency would become an issue at trial.

A title report disclosed that Boykin's son Quizmundo was a co-owner of the home. Boykin called Quizmundo, told him she was selling the property, and asked him to sign the necessary documents. He did, on December 27, and close of escrow was scheduled for 30 days later, January 28, 2013.

The purchase agreement required Sam to make a $10,000 deposit within three days of acceptance, secure $200,000 in financing, and deposit $100,000 of her own funds. On January 25, Jenny He called Boykin and told her that Sam's loan had not yet funded, and there might be a short delay in closing escrow.

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[2] We note the inconsistencies throughout the quoted material regarding currency. The inconsistencies have been quoted directly from the Reporter's Transcript.

Apparently under the misunderstanding that escrow was to close on January 27, in the early morning of January 28, Boykin called Jenny He, inquiring, "Jenny, what is the status of my house? You did not come [on] the 27 that you told me you will come over to close the closing of the escrow. . . ." Jenny He said that the title company is still "verifying their employment." When she heard this, Boykin thought, "Thank you, Lord. I can cancel. I can cancel the contract. I want to get back my house." And she told Jenny He: "Jenny, stop. Don't sell my house. I don't want you to sell my house anymore."

Right after that conversation, Boykin sent Jenny He a text message stating, "Hi Jenny. This is Catalina. Please stop processing the papers. I want to take keep back my house not to sell it any more. I am very sorry Jenny. Thank you very kindly."

Jenny He responded the same day with two text messages. The first said: "Catalina, I just spoke with my broker. You can cancel the contract, but buyer can request damages and my company will request full commission. Please call me." The second: "Catalina buyer doesn't agree with canceling the contract[.] She is getting the loan docs in title this week to close. Please let me know what you want me to do. Wait for hearing from you."

Boykin texted back: "Jenny, again I decided 2 keep the house. This is my only primary home. I got help from my godmother and father until I get back feet." Jenny He replied: "It's more complicated than that. Do you have time today so I can talk to you?"

And more complicated it was.

The purchase agreement contains cancellation provisions governing what is required following a buyer's failure to perform the terms of the contract. It includes the following:

"**C. SELLER RIGHT TO CANCEL:**

"(1) Seller right to Cancel; Buyer Contingencies: If, within time specified in this Agreement, Buyer does not, in writing, Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement then Seller after first Delivering to Buyer a

Notice to Buyer to Perform (C.A.R. Form NBP) may cancel this Agreement. In such event, Seller shall authorize return of Buyer's deposit. [¶] . . . [¶]

"E. CLOSE OF ESCROW: Before Seller or Buyer may cancel this Agreement for failure of the other party to close escrow pursuant to this Agreement, Seller or Buyer must first give the other a demand to close escrow. (C.A.R. Form DCE)." And the purchase agreement allows the buyer two days to perform following the delivery of a notice to perform.

Jenny He contacted the escrow officer to expedite the wiring for the deposit, and on January 28 Sam wired the $10,000 deposit. Jenny He also contacted Quizmundo and asked him to speak with his mother to convince her to go forward with the contract, to eliminate the risk of legal consequences. And on January 31, Jenny He requested Sterling Bank to rush the lending process.

Sam testified that in her experience escrow close dates are flexible and she never expected Boykin to enforce a hard 30-day closing schedule. She also testified she had cash on hand to fully fund and to close the escrow within 24 hours if Boykin had sent the notice to perform or demanded to close escrow.[3] She also testified she was prepared to deposit cash if there was assurance that Boykin would deposit the deed into escrow and go forward with the transaction. But, since Boykin never deposited the deed documents into escrow, Sam "wouldn't put $340,000 in escrow if I knew that the seller wanted to cancel the contract because then my $340,000 would be stuck in escrow like my $10,000 is stuck in escrow now." Finally, Sam testified she had never been denied a real estate loan, and never failed to close escrow because of no loan.

Despite all this, Sam testified she was willing to release Boykin from the purchase agreement if she had a good reason. "It's not all about profit," Sam said, "It's how we behave in society and how we would want the other to treat us." So, on February 6,

[3] Jenny He testified she did not send a notice to perform because she believed Sam would perform within the required time if she received such a notice, if for no other reason than Sam could close escrow by paying cash. This, of course, would defeat Boykin's stated goal of cancelling the purchase agreement.

Jenny He and Sam met with Boykin at her home to discuss the situation. Ross Rhodes, a friend of Boykin's for many years, was also there. Boykin's fundamental position was to deny that she had even entered into the contract. This is how Sam described it: "I walked in. I was going to try to work things out. And the first words out of either Mr. Rhodes' mouth or Catalina Boykin's mouth was, 'I didn't sign the contract.' [¶] And I'm thinking, Whoa, where are we? I was going to come here assuming that she did sign the contract, and we were going to work things out. Now we're back to negative square one. We're not even square one. 'You didn't sign the contract?' " Sam did not believe Boykin was telling the truth.[4]

Nothing came of the meeting, and on February 16 Boykin sent a letter to the escrow company cancelling the purchase agreement.

Since, as noted, Boykin's brief describes her as having "mental impairments," it is appropriate to discuss some of the evidence on this point, which begins with the fact that Boykin was at the time of the events in question an active member of the board of directors of the Geneva Terrace Property Owners Association, which governs the 189 housing units in the development. And in October 2012, Boykin had also helped her union at a "phone banking" project.

Jenny He testified she saw nothing unusual about Boykin's mental condition when she signed the listing agreement or the purchase agreement. Boykin had no trouble understanding.

Sam said, "I think she understands exactly what she wants, and she's very determined."

Rhodes, Boykin's friend who had known her for over eight years, testified that Boykin did not have cognitive issues: "It's good. I mean, as far as her mental capacity. Her physical is fragile, but the old girl, you know, she's not stupid."

[4] At various times at trial, Boykin testified she never understood she was selling her property, Jenny He forced her to sell, and Jenny He never explained the purchase process.

Quizmundo, Boykin's 43-year-old son, testified that when she called him in December to tell him she wanted to sell the house, he trusted her to make that decision: "That is her house, that is her decision." He also checked with his mother before signing the purchase agreement and the listing agreement on December 27. And, later on, when Boykin decided to settle with Sam, Quizmundo deferred to his mother's judgment. Throughout it all, as Quizmundo described it, he never thought that something didn't seem right with his mother, and he would not have expected any other person to pick up anything wrong with her.

The Proceedings Below

The Pleadings

On May 4, 2013, Sam filed a complaint against Boykin and Quizmundo, alleging two claims: breach of contract and specific performance. Sam later dismissed the breach of contract claim, and sought only specific performance.

On September 4, Boykin filed a cross-complaint against Jenny He and Century 21 (hereinafter usually referred to collectively as defendants). It alleged two causes of action: breach of fiduciary duty and equitable indemnity. An amended cross-complaint quickly followed, purporting to allege 11 causes of action. Following demurrers to various causes of action, the case would proceed to trial on the third amended cross-complaint, which alleged six causes of action: breach of contract, negligence, elder abuse, breach of fiduciary duty, constructive fraud, and infliction of emotional distress.

Fundamental to a significant issue on appeal, the tort of another theory for recovery of attorney fees, the third amended cross-complaint alleged as follows:

"149. Ms. Boykin is entitled to recover her reasonable attorneys' fees and costs as damages under the common law 'tort of another' doctrine, originally established by *Prentice v. North Amer. Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620–621, from Indemnitors because Ms. Boykin has been compelled to defend herself against Ms. Sam's Complaint as a result of the tortious actions of Indemnitors.

"150. Paragraph 15 of the Agency Contract contains an attorneys' fees clause, so that Ms. Boykin is entitled to recover attorneys' fees from Ms. He and Century 21."

In October 2014, defendants filed a motion to strike those portions of the third amended cross-complaint, arguing that the court should strike the "improper claims for attorney's fees," specifically arguing that "Boykin is not entitled to attorneys' fees pursuant to the listing agreement" and "Boykin is not entitled to attorneys' fees pursuant to tort of another doctrine."

Boykin filed opposition and defendants a reply, and the matter came on for hearing on November 20 before the Honorable Ronald Quidachay, sitting in the Law and Motion Department. Following a hearing, Judge Quidachay granted the motion to strike, issuing a minute order that provided as follows: "CROSS DEFENDANTs CENTURY 21 REALTY ALLIANCE and YING HE's MOTION TO STRIKE 3RD AMENDED CROSS COMPLAINT is GRANTED without leave to amend. Attorney's fees are not recoverable in this action under paragraph 15th of the Listing Agreement. Tort of another doctrine is not applicable to the case at bar. Prevailing party to prepare order in compliance with [California Rules of Court, rule] 3.1312." The order was submitted, but never signed.

That was the background against which the case proceeded to trial, some 14 months later.

The Trial

The case was assigned by the presiding judge to the Honorable A. James Robertson for trial, and the parties appeared on January 11, 2016. The minutes for that day state that the parties "will stipulate that Judge Robertson [may] try to settle the matter as well as be the trial judge"; that he and counsel "conducted settlement negotiations"; and that the case did not settle.

The case was continued to January 12, where settlement efforts continued without success. The case was again continued and following jury selection, testimony began on January 19. The jury trial continued for nine days, during which the jury heard from 12 witnesses, including Boykin, Sam, Jenny He, Quizmundo, Rhodes, and various experts. Over 70 exhibits were introduced. Following the close of evidence, there was extensive closing argument, where among other things Boykin's attorney asked the jury to award

Boykin "$1,000,000 for emotional distress." Following closing instructions, the case was submitted to the jury late in the afternoon of February 1, accompanied by a 16-page special verdict form.[5]

On February 3, while the jury was deliberating—and as best as we can tell, without any further hearing or discussion—Judge Robertson signed an order to file the fourth amended cross-complaint. And such complaint was in fact filed on February 8.[6]

On February 5, the jury returned with its verdict, answering the questions in the main unfavorably to Boykin. It granted specific performance for Sam. It found against Boykin on her claims for breach of the listing agreement, elder abuse, and infliction of emotional distress, and also her claim for punitive damages.

The verdict found in favor of Boykin on three of her claims, negligence, breach of fiduciary duty, and constructive fraud. The jury further found, however, that the breach caused no harm to Boykin, and that Jenny He did not "unfairly interfere with Catalina Boykin's right to receive the benefits of the contract [with Ms. He]." And in light of what was to develop, perhaps most significant of all was the jury's verdict on Boykin's damages: economic damages of "$0," and noneconomic damages as follows: $350,021 if "she has to transfer her property to Diana Sam" and $17,500 if "she does not have to transfer her property to Diana Sam."

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[5] During deliberations, the jury submitted several questions to the court, two of which indicated that portions of the special verdict form were incorrect in their references. The court sent back answers telling the jury it was right, and that the verdict form was in error.

[6] On January 8, Boykin had filed an ex parte application for leave to file a fourth amended cross-complaint. That application did not attach any proposed pleading, but apparently a proposed fourth amended cross-complaint was later presented to counsel. And we cannot help but observe that the fourth amended cross-complaint that was actually filed embellished the tort of another allegation from the fourth amended cross-complaint that had apparently been earlier presented. For example, the one cross-complaint has 115 paragraphs and the other 138.

We, of course, do not know why the jury did what it did, rejecting Boykin's claims in great part and awarding her the most modest of damages, some 1/60th of what her attorney had requested. However, a review of the transcript here offers a few clues.

To begin with, Boykin's position at trial was not consistent. For example, despite signing the listing agreement and the purchase agreement—and, indeed, asking her son Quizmundo to do the same—Boykin testified that she never intended to sell the home, at one point claiming that she never signed the purchase agreement, at another testifying that Jenny He "forced" her to sign, and at another testifying she contacted Jenny He to "manage" the home. All this was against the background that Boykin admitted that on January 25 she had her personal property shipped to the Philippines.

Boykin's testimony was also inconsistent with that of her son Quizmundo, who testified that Boykin directed him to sign the purchase agreement. And Boykin's friend Rhodes testified that Boykin told him she was selling her house.

Despite sending the cancellation notice, Boykin had trouble articulating a reason she decided against selling her home, even in response to patient questioning by Judge Robertson. Moreover, it could be said that Boykin did all she could to thwart the sale, especially if, as she told Quizmundo a week or so after she signed the purchase agreement, she thought the sale price was too low.[7] Thus, her immediate position upon being told in her early-morning call to Jenny He on January 28 that Sam had not performed: "Thank you, Lord. I can cancel. I can cancel the contract," followed by her reason for her 7:27 a.m. text message: "I tell her to stop selling my house because I feel that when it comes to court I got some evidence to show that I did stop her—to stop her sell my house." At no time did Boykin express any interest in finding out why Sam had not closed, try to resolve any problem, or complete the sale.

[7] Boykin produced no evidence that the value of the home was higher than the agreed purchase price of $350,000. Indeed, the evidence was that the property had been professionally appraised by the bank appraiser for that amount and an expert testified to a similar value. Finally, this value was supported by a comparable sale in the same development for $350,000, which sale closed in 2013, a month after Boykin agreed to sell.

On top of all that, a reading of the transcript reveals many instances where Boykin was hostile and uncooperative to ordinary questioning, to the point of using profanity when she became agitated.

As will be seen, Judge Robertson apparently had a different take on the situation, and from all indications approached the case as Boykin having been victimized. As defendants' attorney Koenig saw it, Judge Robertson was indicating a preference for Boykin even in front of the jury, both in how he questioned Koenig's witnesses and how he interacted with counsel, and Koenig indicated as much on several occasions, manifesting his concern in a variety of ways.[8] And it is true that Judge Robertson interfered with Koenig's cross-examination of Boykin's expert witness Randall Barkan on a critical line of questioning, the notice to perform. That is, Koenig sought to have Barkan assume Sam had the financial ability to immediately deposit sufficient funds into escrow had Jenny He sent the notice; Judge Robertson improperly sustained an objection, precluding Koenig from attacking the adverse expert's opinions.

Postverdict Proceedings

The minutes for February 5, the day the jury reached its verdict, state that the matter was continued to February 8 for an "advisory meeting." On that date, the parties gathered before Judge Robertson, it understood by all that, although the jury issued an advisory verdict awarding specific performance to Sam, Judge Robertson must still make a final ruling on that issue. Judge Robertson confirmed this, and that there were other

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[8] One example was as follows:

"I would just like to state on the record, your Honor, that I believe—and I am not a particularly sensitive guy, and I believe the Court is probably unaware of this, but the number of questions, the frequency, the intonation of some of my witness's and the Court's questions, I believe is not helpful to my side.

"And I am very, very cognizant, aware and appreciative of the Court asking questions to illuminate, to frame the issues for the jury; I totally get it.

"I have been doing this for [a] little while, but I do sense that. Maybe it's totally unintentional in the intonation, the cadence, and I feel a little bit picked on, your Honor. And I have to say that to you, with all the greatest of respect."

issues to be ruled on by him, what he called "three level 1 decisions" for him to decide, which he went on to describe: "There's specific performance, there's attorney's fees on specific performance, and there are attorney's fees on tort of another. Those are the three Level 1 issues."

Following some colloquy between Judge Robertson and Boykin's counsel on issues of rescission and lis pendens, Judge Robertson said he wanted "to shift over to tort of another." Then, after brief comments by Boykin's counsel about attorney fees, Koenig asked to be heard at the appropriate time. Judge Robertson said, "No, not just a minute, now," then asked Koenig, "Now, Mr. Koenig, so why is it that you don't think they at least should have a right to ask for—I'm not saying given, but to ask for tort of another attorney's fees?" Koenig responded, "Your Honor, this issue has come up since day one when I first met you in settlement conferences. Throughout the trial, I had to raise this issue repeatedly to state my client's and preserve my client's opinion. [¶] Going into this trial, the only attorney's fee potential exposure to my clients was elder abuse. You can get attorney's fees in elder abuse. And I've mentioned this to the Court ad nauseam. We did hear towards the end some issue of tort of another. [¶] When the Court started dealing with attorney fees issues, you always had to listen to me say, yes, of course, your Honor, it's appropriate. However, I've always told you we've already made—the Court's already ruled on this very issue."

Judge Robertson asked, "How is that?"

Koenig responded, in detail: "In demurrer, we first got the complaint for these very same issues coming from the listing agreement, breach of fiduciary duty, constructive fraud, concealment. We've already—we discussed this.

"That was ruled in the courtroom next door, . . . and it's ruled a tort of another was not applicable to these very causes of action which the Court is considering right now. The Court already ruled on that. Number one.

"And the Court was clear on that ruling, and we discussed it in open court. And I believe that has already been decided as a rule of this case on that issue.

"The—and I have it here, your Honor. I have it on the register of actions 11/20/14. And you'll recall that Ms. Norman [counsel for Boykin], when we argued this before, said, 'Mr. Koenig was correct on those issues.'

"And it was Department 501, 'Cross-defendants Century 21 Realty Alliance and Ying He's motion to strike third amended cross-complaint is granted without leave to amend. Attorney fees are not recoverable in this action under Paragraph 15 of the listing agreement,' period. 'Tort of another doctrine is not applicable to the case at bar. Prevailing party to prepare order in compliance. Judge Ronald Evans Quidachay, Clerk Jose Rios Merida."

Pages of discussion followed, during which the courtroom clerk searched the court records, Judge Robertson at one point observing that "I don't have a written order." Then, a few lines later, Judge Robertson asked Koenig: "Tell me, without talking about this previous ruling by Judge Quidachay and [its] effect . . . [¶] . . . [¶] why are attorney's fees of another not applicable?"

Koenig again explained his position. Judge Robertson asked for a copy of the motion to strike and then took a recess.

Upon Judge Robertson's return to the courtroom, counsel for Boykin asked to say "one quick thing," going on for 18 lines discussing tort of another cases. Judge Robertson interrupted:

"So let me ask another question here. So we've got three level one decisions, okay, that we're talking about here. [¶] . . . [¶] So I got a picture on the first—I got a picture on the specific performance one. I got a picture on the tort of another. [¶] But I don't know what—what attorney fees are you claiming under tort of another, the amount? [¶] . . . [¶] A rough number." Counsel for Boykin responded, following which Judge Robertson asked how much "for costs." Counsel responded, adding "that's the Lodestar, your Honor. That's with no multiplier." And then Judge Robertson said this: "So here's what I think you should do. I think you should—because there's—you've got these—these three level one issues have enormous consequences to the case. [¶] Whether attorney's fees—I mean, there's a huge swing here in terms of where you're at in the

case. So I think you should try to settle the case again. That's what I think you should do. And so—I would not act as a settlement judge in the case, because I have to decide all three level one issues. [¶] So I'd send it to another judge. So I thought about Judge Lynn O'Malley Taylor. So she's available, actually, this afternoon. You could go up there right now and try to settle it with her."

Judge Robertson asked counsels' views about this suggestion for settlement. Koenig said, "I always will." Apparently reading Judge Robertson's comments as favorable to her, counsel for Boykin responded, after talking to her client, "We're not interested in moving forward with settlement. We'd like to hear what your Honor has to say." Judge Robertson said that he was ordering the parties to settlement. But, he said, he would give a tentative ruling on the "three level one issues" so they would "have a framework for where I'm headed on this thing." This is what he said:

"Okay. So I'm going to give a tentative decision. So this is under [California Rules of Court, rule] 3.1590, so it does not constitute a judgment, and it can be changed by the Court. It's not at all binding. I'm going to give it very early on in the process because I think it would be helpful for you to have it.

"And I want to tell you that I've been paying close attention to this case as it's been going along, as well as I've had—I'm—so the tentative is only going to be on the—it's not on the amount of attorney's fees. I'm not going to give one on the amount at this time.

"So the tentative is as follows:

"Grant specific performance. Deny Sam's—Ms. Sam's attorney's fees on the ground of a breach of the requirements of the contract, purchase contract, relating to mediation. [¶] . . . [¶]

"On tort of another, grant attorney's fees on tort of another, grant tort of another. I find there's no order under—no order to strike. There's no grounds to strike it, and I think they're appropriate. So it's granted.

"So what you have, then, is you have—as I see it, what you've got is you've got 329,000, plus Ms. Boykin would get 350– on specific performance, 679–.

"Ms. Sam gets the property.

"And also you're entitled to attorney's fees, an additional attorney's fees. And you told me that would be in the range of $400,000."

The case did not settle before Judge O'Malley Taylor.

On February 10, Judge Robertson issued an order titled "Requiring Counsel to Provide Information as to Attorneys' Costs and Fees Claimed by Attorneys for Catalina Boykin." The order was five pages long and among other things told Boykin's attorneys precisely what they should provide, and even asked if they were requesting a multiplier. Despite that tort of another attorney fees are damages, Judge Robertson also ordered Koenig to provide, in great detail, the attorney fees incurred on his side.[9] Both sides' attorney fee information was to be provided by February 16.

Judge Robertson's February 10 order also said he would conduct a hearing on February 18, in a paragraph that provided in full as follows: "The Court will conduct a hearing at 2:00 p.m. on February 18, 2016, to hear oral arguments with respect to the amount of attorney's fees that should be tentatively awarded in its tentative decision concerning tort of another attorney's fees (previously the Court tentatively decided that Counsel for Defendant and Cross Complainant were entitled to attorney's fees and costs under the theory of tort of another)."

On February 17, Judge Robertson filed what he called a "Tentative Statement of Decision . . . Awarding Attorney's Fees to Attorneys for . . . Boykin Under the Tort of

[9] The order compelled Koenig to provide the following: "The hours spent for the entire case by specific date and activity—subtotals should be provided for the major phases of the case—e.g., discovery; trial preparation; trial attendance; etc. In addition the hourly rates actually charged by all attorneys should be supplied and the lodestar hours multiplied by the hourly rate should be provided for each major activity. In lieu of the information required to be provided in the previous 2 sentences, Mr. Koenig and his firm may provide copies of the bills that they sent out in the case; however, if they do so, they are ordered to redact each and every billing entry that contains attorney-client privilege or work product privileged information (case law provides that normal billing entries do not constitute work product or attorney client privilege matters)."

Another Doctrine." This tentative decision was 17 pages long and among other things concluded that Boykin was entitled to recover tort of another attorney fees.

Meanwhile, on February 17, defendants had filed a brief "regarding inapplicability of tort of another." The brief was 12-pages long, cited numerous cases, and argued that the tort of another doctrine did not apply, on four separate and independent bases: (1) Boykin did not prevail on specific performance; (2) Boykin's need to defend the specific performance action did not arise from the acts of Jenny He or Century 21; (3) Judge Quidachay's ruling struck the tort of another doctrine without leave to amend; and (4) the fourth amended cross-complaint was not the operative complaint at trial.

The next day, February 18, Judge Robertson filed what he called "Tentative Decision—Amount of Attorney's Fees—Tort of Another." This decision was seven pages long and went on to award tort of another fees of $794,579, which amount included 1.5 and 1.2 multipliers, despite that tort of another fees are awarded as damages.

Apparently referring to defendants' February 17 brief, the minutes for February 18 reflect that Judge Robertson stated to counsel "that the current tentative decision which was distributed today was just a tentative finding and is open for argument"; and following that argument, Judge Robertson "requests further briefing," in addition to which he will "need more time to review [Century 21 and Jenny He's] briefing submitted earlier today." Counsel were ordered to report to the Court before the end of the day, February 22. On February 19, Judge Robertson issued another order allowing defendants the opportunity to be heard on the tort of another issue.

On February 22, defendants filed another brief on the tort of another issue, which addressed Judge Robertson's February 18 tentative decision. This brief was 16-pages long, and among other things urged that Judge Robertson's facts and law were erroneous. That same day, Boykin filed her own brief on the tort of another issue.

That gets us to February 26.

The minutes for February 26 provide that the "matter is on calendar for the parties to meet and talk of a possible settlement." And those efforts at "possible settlement" would be presided over by Judge Robertson, despite his earlier observation on February 8

that his participation would not be appropriate—and despite that the three level one issues were still in the "tentative" stage.

The reporter's transcript for February 26 begins with the observation that there was a "discussion off the record" from 9:38 a.m. to 5:53 p.m. There follow 30 pages of transcript, beginning with Judge Robertson's introduction that "we have a settlement agreement that you have here . . . so would you have your clients please sign this settlement agreement . . . ." They did, and the settlement agreement was read into the record. It provides in its entirety as follows:

"Diana Sam, Plaintiff ('Sam'), and Defendant and Cross-Complainant, Catalina Boykin ('Boykin') and Arturo Quizmundo ('Quizmundo'), agree to settle all claims between them on the following terms and conditions:

"1. With respect to the jury verdict that was returned on February 5, 2016, and which granted specific performance to Diana Sam, and which awarded Boykin total non-economic damages of $350,021 'if she has to transfer her property to Diana Sam,' Ms. Boykin and Mr. Quizmundo agree to sign a note and deed of trust for $230,000 in standard form to bear interest at 1% simple annual interest. After 4 years, the simple annual interest will increase to 4%. The interest is to accrue but not be payable. Interest and principal is payable in thirty (30) years. The note may be prepaid at any time without penalty, and the deed of trust will be removed.

"2. Ms. Boykin will be entitled to remain in the house and to retain title of the house at all times, subject only to the note and deed of trust.

"3. This agreement is a final agreement in full to settle all claims between Ms. Sam and Ms. Boykin and Mr. Quizmundo—Ms. Sam, Ms. Boykin, and Mr. Quizmundo agree to mutually release each other and to waive all claims both known and unknown, and to waive all rights under California Civil Code section 1542: 'A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.' This agreement shall be enforceable by trial Judge A. James Robertson, and the parties agree to Judge Robertson

and/or the San Francisco Superior Court continuing jurisdiction to enforce this judgment pursuant to [Code of Civil Procedure section] 664.6."[10]

Quizmundo, who was on the phone, agreed to the settlement. A few formalities were then discussed, following which Judge Robertson voir dired about the settlement. Following all that, Judge Robertson said: "So now at this time I have—I handed out an order approving a settlement agreement form of order that I tentatively intended to sign. However, I'll hear any objections from Mr. Koenig."

And did he have objections. Koenig talked at length, for over four pages in the transcript, asserting in forceful terms, in what must have been some level of discomfort, his concerns about what had occurred—especially the pressure that Judge Robertson had put on the parties to settle. It is difficult to well describe Koenig's criticisms by narration, or description, or paraphrasing, as the vigor of his position is only appreciated by exactly what he said. Here are the first four paragraphs:

"Thank you, Your Honor. We started this settlement conference at approximately 2:00 o'clock. I have been gagged since that time. I tried to make a record, I've tried to speak, I have been prevented. And at approximately 3:00 o'clock the court told me to shut up and slammed her [*sic*] hand down, and that's never happened to me in this court or ever before. I have not been able to say one thing and sit there, and I objected to this settlement conference to this court, who is in the midst of making final rulings on three tentative rulings. And the Court went to each the plaintiff and the defendant and told them they needed to sign this agreement because it's going to be worse for them.

"I'm sitting there watching this as my client is—they're talking about appeal and how they're going to prevent this and insurance and all the machinations, which I could not participate in at all. My client was deprived of due process. I wanted to go up to Judge O'Malley. This is a tremendous injustice. This is not in accordance with [Code of Civil Procedure section] 876. We need to thoroughly brief this. The court is basically

[10] Century 21's brief asserts that "Judge Robertson participated in and assisted in drafting the settlement agreement and the various iterations of the suggesting documents." Boykin does not take issue with this assertion.

telling—and I have not been able to make a record or anything. Basically the Court is basically saying they're going to grant the tentative just because of the settlement. They are so intertwined with the last four hours, it's a miscarriage of justice, Your Honor. And you even heard the defendant [Sam] herself say it's unfair. I couldn't have said it better myself."

Koenig went on in a similar vein for over two more pages, criticizing the court-involved settlement as contrary to the jury's verdict, which was "intending a wash" to Boykin. Koenig reiterated that "[f]or the last four hours the Court has basically told both sides the Court is going to grant the specific performance and you need to do this. . . . My client didn't have a chance in this thing at all. And that is not what the jury found. . . . [¶] . . . This settlement was not made in good faith . . . ." And Koenig concluded:

"And the jury, which spoke clearly, that was the maximum they wanted the award at 350,012 [*sic*] versus 17,500. Now we're never going to know that, and the Court forged this settlement in telling both plaintiff and defendant that it will be worse for them if they didn't. And the Court has the power to make that decision. I don't feel my client had due process in this and was fairly treated because there's a swing, it is 17,500 and 350,021. And, you know, it made a big difference and we had absolutely no input on this. And also the Court—the Court's already prepared an order and is ready to sign it. And we've got a dozen iterations and certainty as to whether the real party in interest, the defendant, even wants to go through with the deal.

"But, you know, this case is not over yet. We have several issues to still consider. And I would, you know, urge the Court that this—you know, that we have an opportunity to participate in further settlement conversations on this topic and be heard. Thank you."

Judge Robertson responded as follows:

"So let me say a couple of things here. First of all, with respect to the proceedings that we had, these—there were substantial discussions between Mr. DeVries [counsel for Sam], Ms. Norman [counsel for Boykin], and Mr. Kaludi [co-counsel for Boykin] respecting settlement. Mr. Koenig was asked if he would like to not be present, and he

said he would. The Court allowed him to be present. He was permitted to be present through all these discussions. I think he had a right to be.

"The Court controls how the case is tried or decided, and the Court elected not to hear Mr. Koenig because I didn't think it was at all relevant or pertinent until an agreement was made.

"Once an agreement was made, Mr. Koenig had the right to object to it, which he did. So the Court actually very carefully considered this settlement agreement, and it finds that it is completely in accordance with the jury verdict. The jury returned a verdict for $350,000 to Ms. Boykin if she lost her property. The jury also returned a verdict that—in favor of Ms. Sam stating that it was a finding by the jury that she did lose her property.

"With those two rulings by the jury, the parties—Ms. Boykin and Ms. Sam—were entitled to reach an agreement with respect to that jury verdict. The jury intended that that $350,000 be used to compensate Ms. Boykin for the prospective loss of her property. She was able—the agreement here basically provides terms under which she's not to lose her property and instead signed a deed of trust perfectly in accordance with what the jury had in mind, and this Court so finds. And it's absolutely permissible to settle this case. And for that reason I'm going to approve the settlement. I also find that it's in good faith pursuant to [Code of Civil Procedure section] 877.6. I considered that. [¶] . . . [¶] So I'll enter the order. I don't think it's—I think because I'm the trial judge, I don't have to go through the procedure of allowing further briefing and an argument on this issue of good-faith settlement."

Koenig then asked, "May I make an inquiry, Your Honor? So the Court was following the jury's verdict and believes that this is consistent; correct?" This colloquy followed:

"THE COURT: That's right.

"MR. KOENIG: Okay. And that means Ms. Sam did everything—did not find fault with Ms. Sam?

"THE COURT: No. It was a tentative decision that the jury's verdict was an advisory verdict. It advised the Court had power to—it's an equitable issue. The Court had power to settle, to decide it differently.

"MR. KOENIG: So—

"THE COURT: So I think this is the essence of a good settlement."

That was the totality of Judge Robertson's response. Not one word of it took issue with any of Koenig's accusations.

On February 29, Judge Robertson filed an order that provided as follows: "This Court now approves the attached 'Settlement Agreement' between Diana Sam, Catalina Boykin, and Arturo Quizmundo, on the ground that the settlement fully conforms and is in accordance with the jury verdict for non-economic damages of $350,021 as well as all other provisions in the jury verdict and all other applicable provisions of law including that this settlement was entered in good faith pursuant to California [Code of] Civil Procedure Section 877.6."

On March 7, defendants filed another brief on the tort of another issue, arguing that tort of another fees had no evidentiary basis in any obligation that Boykin owed to her counsel; that the jury's advisory verdict and the decision to award specific performance to Sam made Boykin the wrongdoer, barring tort of another damages entirely; and in any event the amount of attorney fees awarded as tort of another damages was excessive.

On March 14, Boykin filed two briefs on the tort of another issue. One argued the propriety of awarding such fees, the other addressed the amount of such fees, asking Judge Robertson to increase the hourly rate awarded in the tentative ruling.

On March 22, Judge Robertson issued an order entitled, "Regarding the Allocation of Tort of Another Attorney's Fees and Allocation of Damages." The order is difficult to describe, as it consists of four single spaced pages that, after a short introduction, sets forth 13 questions "counsel . . . are directed to answer, many of which questions ended with "Answer yes or no and if necessary explain your answer."

Counsel for both sides responded to the questions, defendants on March 24, Boykin on March 30, two days late.

Meanwhile, on March 24, Judge Robertson issued an order requiring counsel to submit "information on adorned Hourly Attorney Rates," which he defined as "the competitive hourly rate plus an additional factor for contingency."

On April 1, defendants filed "objections to . . . Boykin's submissions and demand for jury trial."

On April 18, Judge Robertson issued his statement of decision awarding attorney fees as damages under the tort of another. The decision was 46 pages long, and had appended to it 23 exhibits. The decision ultimately awarded $588,938 in attorney fees, essentially based on the following:

"The Court disagrees with the position of both Jenny He and Century 21 Realty Alliance, and Ms. Boykin. The recovery of attorney's fees under the Tort of Another doctrine as damages is similar to recovering medical expenses as economic damages in a tort case. To be recoverable, the medical expenses do not have to be actually paid. They can be recovered as long as they are actually incurred and are payable.

"In this case, Ms. Norman had a contingency fee arrangement with Ms. Boykin, whereby Ms. Boykin agreed to pay a percentage of her recovery to Ms. Norman. On February 18, 2016, the Court asked Ms. Norman about her contingency interest and whether she would be willing to waive it in exchange for receiving an award of attorney's fees under the Tort of Another doctrine. Ms. Norman responded, 'I don't see that there would be any need for me to accept a contingency and receive these fees.' It is in the Court's recollection that Ms. Norman confirmed that she would waive the contingency in exchange for being able to recover Tort of Another attorney's fees. Accordingly, the Court finds that Ms. Norman relinquished this right to recover a contingency fee in exchange for her ability to recover legal expenses, as damages, under the Tort of Another doctrine for the hours she expended. Because of this agreement, the Court finds that Ms. Boykin is legally obligated to pay Ms. Norman for the fair market value of the hours

that she has expended which are recoverable under the Tort of Another doctrine. The Court finds that such obligations arise by contract, by quantum meruit and by equity.

"The Court finds the rate that should be paid for the hours is the hourly rate for attorneys with the level of experience of Ms. Norman, Mr. Kaludi, and Mr. Insdorf for a contingency case. Since the hours were expended when the case was a contingency case, the Court finds that the fair market value of the hours includes an allowance of the fact that the case was based on a contingency and there were no regular payments for fees. For the hours expended on a contingency basis, this rate is sometimes referred to as the 'adorned lodestar.' The Court finds that this is the fair market value rate for these hours. Since the attorney fees recovery is a damage recovery, it may not include a multiplier because the multiplier is given for other reasons that are not related to the market value of the hours expended."

The decision also awarded Boykin the $350,021 amount in the jury verdict.

For the next several weeks, the parties filed numerous briefs, most of which involved issues not germane to this appeal.

On June 20, defendants filed objections to the proposed judgment. This was the apparent cause of Judge Robertson's Final "Amended Statement of Decision and Judgment" filed June 28. That final judgment awarded Boykin the same amount as the previous decision: $350,021 "on the jury verdict" and $588,938 in attorney fees for tort of another, a total of $938,959.

On July 13, defendants filed a motion for new trial, asserting four grounds: (1) the jury's verdict was subverted by the judgment; (2) tort of another fees were not proper because Boykin incurred no fees; (3) Boykin as a "wrong-doer" did not qualify for a tort of another award; and (4) Judge Robertson's impartiality was compromised. Judge Robertson denied the motion by order of August 16.

Meanwhile, on July 6, defendants filed a notice of appeal

DISCUSSION

Jenny He and Century 21 have filed separate briefs, both contending that the judgment is erroneous on multiple grounds and must be reversed, indeed, with directions

that judgment for Boykin be for $17,500, the amount awarded her by the jury if she was allowed to retain her home. We agree with the appellants on two of their arguments, and need not reach the others.

The Judgment Awarding Boykin $350,021 Against Jenny He and Century 21 is Inconsistent With the Jury Verdict

As discussed above, the jury answered numerous questions on the special verdict, one of which was advisory only, that dealing with specific performance. All the others were the jury's final determinations, including its decision on Boykin's six claims and, if any had merit, the amount of her damages. Finding for Boykin on three of her claims, the jury awarded Boykin the most modest of damages: economic damages of "$0," and in alternative awards on non-economic damages, depending on whether Boykin had to part with her home: $350,021 if she "has to transfer her property to" Sam, $17,500 if she "does not."

This verdict was read on February 5. Some four months later, Judge Robertson entered his amended final decision that awarded Boykin $350,021 and allowed her to keep the house, an amended decision that was entered against the background that no new evidence on the issue had been received. Rather, what had occurred were only two things: (1) the voluminous, and we mean voluminous,[11] papers filed on the tort of another issue, and (2) the settlement. That settlement was, as quoted, made in light of Judge Robertson advising all parties of his tentative decision which, as he put it, would be the "framework" against which the parties should negotiate. And while we do not know all that went on in the course of the settlement discussions (Koenig's request for a record having been denied), Koenig's various attributions of Judge Robertson's pressure on the parties to settle—e.g., "sign this agreement because it's going to be worse for them"—remain unrebutted in the record.

Against that background, Judge Robertson went on at length in his amended final decision in attempting to explain how he reached the conclusions he did, the essence of

[11] The jury verdict appears at page 397 of the clerk's transcript. The complete clerk's transcript is 1,342 pages, almost 1,000 pages of material postverdict.

which was this: "The Court found that the settlement agreement was in conformity with what the jury intended by its verdict of $350,021 'if she has to transfer her property to Diana Sam.' This is because the jury would have intended for Ms. Boykin to be able to use the verdict of $350,021 in reaching a settlement with Ms. Sam so that she could remain in her house. This use conforms with the intentions of the jury to have Ms. Boykin use the award to compensate her in the event that she had to transfer her home to Ms. Sam."

We do not understand how such a statement can be made, as it is based on nothing but speculation. Simply, there is no way to know what the jury would have "intended," and thus no support for the conclusions that "the jury would have intended for Ms. Boykin to be able to use the verdict of $350,021 in reaching a settlement with Ms. Sam so that she could remain in her house" or that "[t]his use conforms with the intentions of the jury to have Ms. Boykin use the award to compensate her in the event that she had to transfer her home to Ms. Sam."

Judge Robertson's amended final judgment was inconsistent with the jury's verdict. It was error.

Hoopes v. Dolan (2008) 168 Cal.App.4th 146 was, like here, a case involving both legal and equitable issues, decided by our colleagues in Division Three. There, in its discussion about the judge's role in such a situation, our colleagues held that while the trial judge may make his or her own independent findings or to accept or reject the jury's advisory verdict, "[i]n contrast, a judge is bound by a jury's verdict rendered on legal causes of action. (*Southern Pacific Land Co. v. Dickerson* (1922) 188 Cal. 113, 116.) A jury is not 'a mere advisory body' in deciding legal causes of action. (*Ibid.*) It has long been held that, 'where a party is entitled to a jury as a matter of right, the court is without authority to enter a judgment contrary to the verdict and that the determination of a jury is conclusive unless set aside upon the granting of a motion for a new trial or unless the general verdict is inconsistent with special findings of fact made by the jury.' " (*Hoopes v. Dolan, supra,* at p. 156.)

Bigboy v. County of San Diego (1984) 154 Cal.App.3d 397, 406, is particularly apt, holding that "[t]he judge is not permitted to substitute his judgment for that of the jury on the question of damages unless it appears from the record the jury verdict was improper." As Justice Bray confirmed long ago: when "the intention of the jury is clear from the language of the verdict, . . . the court has no power to make a judgment that does not conform to the intention of the jury." (*Telles v. Title Insurance & Trust Co.* (1969) 3 Cal.App.3d 179, 187.)

Judge Robertson cited two cases in claimed support of his decision: *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, and *J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323. Neither is supportive. *OCM Principal* involved a situation where the court sought clarification from the jury while it was still impaneled, and then conformed the judgment to reflect that clarification. (*OCM Principal*, at p. 879.) *Carlsbad Unified* did nothing more than affirm a specific verdict that sufficiently addressed the essential elements of estoppel. (*Carlsbad Unified*, at p. 339.)

Not only did Judge Robertson engage in speculation to reach the decision he wanted to reach, he entered a decision that was internally inconsistent. As noted, the tentative decision Judge Robertson imparted to the parties was to grant specific performance, a decision that necessarily included a finding that Sam was "ready, willing, and able to perform," and thus with the funds needed to purchase the home (13 Witkin, Summary of Cal. Law (11th ed. 2017) Equity, § 30, p. 316)—a fact, we note, supported by extensive evidence at trial showing just that. With that tentative decision hanging over their heads, the parties were ordered to attempt to settle, unsuccessfully at first before Judge O'Malley Taylor, and then successfully with Judge Robertson.

The amended final decision followed, which in essence adopted inconsistent findings. Judge Robertson found defendants liable for tort of another attorney fees because Jenny He had failed to give Sam a notice to perform; and if she had sent that notice and Sam had failed to perform, then Sam could not obtain specific performance. Therefore, to create a causal link between Jenny He's failure to send the notice and

Boykin's damages, Judge Robertson had to also find that if Sam had been given a notice to perform, she would not have been able to perform. And so he found: "if Ms. He had given a Notice to Buyer to Perform or a Demand to Close Escrow, Ms. Sam would not, and could not, have timely performed by depositing the purchase price on or before February 16, 2013."[12]

This finding, however, had an additional effect. Under it, Judge Robertson could not have awarded specific performance to Sam, as she could not have met a requirement for specific performance, the ability to perform. However, earlier in his same amended statement of decision, Judge Robertson had found that "[t]he jury verdict on specific performance and the Court's tentative decision were in favor of Ms. Sam. . . . Accordingly, absent some settlement being reached, Ms. Boykin would have lost her home and suffered the non-economic damages of $350,021 which the jury found she would suffer."

This was simply not so. Because Judge Robertson found in the same amended statement of decision that if Sam could not perform, Boykin would not "have lost her home." Therefore, the very reason for Judge Robertson's award of $350,021 was undermined by his own finding that Sam could not have performed. The decision was internally inconsistent: Sam could perform, or she could not perform; she could not do both.

Jenny He describes Judge Robertson's approach as wanting "Boykin to have her cake and eat it too, i.e., to keep her house and also receive the $350,021. To accomplish this, [Judge Robertson] twisted the meaning of both the settlement agreement and the jury's verdict." We do not ascribe any improper motive to Judge Robertson. But we find his reasoning unpersuasive. Judge Robertson's "Amended Statement of Decision" of June 28 based the non-economic damages of $350,021 on Boykin's claimed emotional

[12] We note that this finding was inconsistent with the jury's advisory finding that Sam was entitled to specific performance, as the jury was instructed to approve specific performance only if the jury found "[t]hat Diana Sam did all, or substantially all, of the significant things that the contract required her to do."

distress, with this explanation: "On February 26, 2016, Plaintiff, Ms. Sam, and Defendants, Ms. Boykin and Mr. Quizmundo, entered a settlement agreement with respect to the jury verdict of $350,021 that was approved by the Court. The jury verdict of $350,021 was for non-economic damages if Ms. Boykin was required to transfer title of her home to Ms. Sam. The jury knew Ms. Boykin would receive the sale price of $350,000 for the transfer. Substantial evidence of the non-economic damages Ms. Boykin would suffer if she lost her home was presented to the jury. When Ms. Boykin was questioned in Court about her home and its potential loss, she became emotional and tearful on several occasions during her testimony. In addition, Ms. Boykin's treating psychologist, Dr. Hamilton, testified that Ms. Boykin suffered from a DSM-5[13] diagnosis of Major Depressive Disorder. Dr. Hamilton testified that one of the stressors causing diagnosis was the issues relating to her home. Substantial evidence established that the actions of the Defendants, Ms. He and Century 21, put Ms. Boykin in the position where the loss of her home would have caused her grief, anxiety, and emotional distress. [¶] By the time of the jury verdict in 2016, there had been substantial appreciation in price of single-family homes since December 2012 when the purchase price of $350,000 had been set. Accordingly, it was clear Ms. Boykin would have had to pay substantially more than $350,000 for a similar property."

This ruling cannot be squared with the jury's verdict. By awarding Boykin only $17,500 if she kept her home, the jury necessarily rejected Boykin's claim that she would suffer emotional distress damages greater than $17,500 if she was permitted to retain her home.

Awarding Tort of Another Attorney Fees Was Error

The Claim Had Been Stricken

[13] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DMS—5th ed. (2013) Major Depressive Disorder, pp. 160–161.

The tort of another doctrine, sometimes called the third-party tort doctrine, provides that a party may be awarded attorney fees in a situation where one person commits a wrongful act that he or she can reasonably foresee would cause another to have to defend or prosecute a lawsuit involving a third party. As the Supreme Court has described it: "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North American Title Guaranty Corp., supra,* 59 Cal.2d at p. 620 (*Prentice*).) The attorney fees recoverable are those incurred litigating against the third party, not those incurred litigating against the tortfeasor.

The doctrine is not an exception to the rule that parties bear their own attorney fees, "but an application of the usual measure of tort damages. The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action. In such cases there is no recovery of attorney fees qua attorney fees. . . . [¶] . . . [N]early all of the cases which have applied the doctrine involve a clear violation of a traditional tort duty between the tortfeasor who is required to pay the attorney fees and the person seeking compensation for those fees." (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310.)

The tort of another rule does not apply if the party claiming fees is not "compelled or required" to bring or defend the action, or if the need to bring a suit was, to some measurable degree, the fault of the party requesting fees. (*UMET Trust v. Santa Monica Medical Investment Co.* (1983) 140 Cal.App.3d 864, 872.)

Particularly apt, in light of what occurred here, the rule is that tort of another attorney fees must be "pleaded and proved to the trier of fact." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 869, fn. 4; accord, *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 79.) And the issue is for the jury. (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 56; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819 ["Since the attorney's fees are recoverable as damages, the determination of the

recoverable fees must be made by the trier of fact unless the parties stipulate otherwise"].)

As to "pleaded and proved," we briefly recap the setting here, where Boykin's third amended cross-complaint alleged tort of another attorney fees. Long before trial, that allegation was stricken by Judge Quidachay, in a minute order that provided that the "[t]ort of another doctrine is not applicable to the case at bar." The motion to strike was granted in November 2014, and there followed case management conferences on January 7, 2015, continued to February 18, and then May 20. Boykin filed case management statements for those conferences, and points to nothing in any statement that she was asserting a claim for tort of another attorney fees.

The case proceeded to trial in February 2016. Boykin points to no trial brief asserting a claim for tort of another fees. There was no assertion in opening statement that Boykin was claiming such fees. And no jury instruction was proposed dealing with the issue. In short, there was absolutely no indication that Jenny He and Century 21 would be facing such a claim.[14]

Despite all that, on January 26, the sixth day of testimony, in the course of a long discussion about Boykin's elder abuse claim, acting on his own, Judge Robertson at the end of a long day said, "Let me ask another question here. So, tort of another." And, three lines later, he said, "And equitable indemnity . . . and you got that framed in a way that it's tort of another. Is that—that's not a legal claim is it? Are you entitled to put that to the jury?"

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[14] In light of this, the observation in Pearl, California Attorney Fee Awards (Cont.Ed.Bar 2nd ed. 2008 supp.) Overview, section 1.2, pages 1-3 is apt: "The prospect of court-awarded attorney fees plays a significant part in determining a strategy for initiating or defending litigation. Litigation costs (including the potential fee award) can be enormous, sometimes rivaling or even exceeding the amount involved on the merits." (Accord, *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1186, quoting Pearl.) "Therefore, in planning to initiate or respond to litigation, it is critical to determine whether a statute, a common-law theory, or a contractual provision might provide for some form of fee-shifting." (Pearl, *supra*, § 1.2, p. 1-3.) Indeed, "the policy indicating the mere threat of an attorney fees award alters the dynamics of litigation." (*Emigh*, *supra*, 84 Cal.App.4th 1175, at p. 1191.)

The reaction was immediate: Sam's attorney De Vries said, "It was stricken. It was stricken"; and Koenig said, "Two things, Your Honor, on that point." Boykin's attorney responded that "we still have equitable indemnity," to which De Vries responded, "You don't have tort of another." Koenig then went on to refer to earlier proceedings, and an "earlier agreement" with one of Boykin's attorneys. Some discussion ensued about breach of contract (and related issues), following which one of Boykin's attorneys said that in a breach of fiduciary duty case "you can get the tort of another in attorney's fees."

Sam's attorney responded, "I'm sorry. I mean, this isn't even my thing, but it bothers me. Look at the Register of Actions, November 20th, 2014 in this case, Department 501, 'Cross-defendant Century 21 Realty Alliance and Ying He's motion to strike third amended cross-complaint is granted without leave to amend. [¶] Attorney's fees are not recoverable in this action under Paragraph 15 of the listing agreement. Tort of Another Doctrine is not applicable to the case at bar.' "

Judge Robertson asked, "Whose decision is that? Is it Quidachay?"

Boykin's attorney took the position that Judge Quidachay's ruling was limited, and that "equitable indemnity . . . is still in," and the following occurred:

"THE COURT: So if it's equitable indemnity, so—let me just tell you what I'm concerned about.

"MS. NORMAN: Okay.

"THE COURT: So if you think you want to put to the jury what the attorneys' fees are in this case, I mean, I had no idea that that was coming down the tracks.

"MR. KOENIG: Me neither, your Honor. That was stricken two years ago.

"THE COURT: I had no idea that was going to come down the tracks.

"MS. NORMAN: It's not.

"MR. KOENIG: We're surprised too."

As indicated above, and confirmed in more detail below, from that point on every time the subject of tort of another was presented counsel objected that the issue had been

eliminated by Judge Quidachay. To no avail, it would turn out, as Judge Robertson effectively reversed Judge Quidachay's decision without explanation.

Boykin's fundamental position relies on a stipulation made on January 28. According to Boykin, the tort of another doctrine had been discussed "multiple times, both off and on the record." But Boykin cites only one instance of claimed discussion before January 28, that discussed above.[15] In any event, the stipulation provides no support to Boykin. The entire record on the stipulation is some two pages, as follows:

"THE COURT: So we're on the record. So we've been discussing the issue of attorney's fees. So it's stipulated and agreed between all parties, to the extent that attorneys fees need to be decided in the case and haven't been decided up to now, any—any decision will be made by the Court on those matters.

"And no party will have a right to claim that the Court does not have jurisdiction to enter attorney fees because there was some jury trial right to have them heard. So stipulated?

"MS. NORMAN: So stipulated.

"MR. KALUDI: So stipulated.

"MR. DeVRIES: So stipulated, your Honor.

"MR. KOENIG: I will stipulate to that; however, I will remind this Court that the Court has already ruled with respect to the listing agreement and also tort of another, that those claims are dismissed against the cross-defendants—

"MS. NORMAN: No.

"MR. KOENIG: —He and Century 21.

"MS. NORMAN: No.

"THE COURT: I don't think I've ruled on that.

"MS. NORMAN: No, no—

"THE COURT: All I'm trying to do here is—

"MS. NORMAN: Your Honor—

[15] Boykin also cites RT 2484:16 and 2485:11–16, long after January 28.

"MR. KOENIG: It was a law and motion, your Honor. [¶] . . . [¶]

"THE COURT: Let me just be sure because this is an important stipulation. It will save a lot of time here.

"So all I'm asking for, we stipulate and agree that the Court will decide all matters of attorneys' fees and costs after the trial and that no one will object to the Court deciding all those issues because they were jury issues and should have been presented to the jury. So stipulated?

"MR. KALUDI: So stipulated.

"MS. NORMAN: So stipulated.

"MR. KOENIG: Agree with the comment that, in 501, they already ruled on the actions on 11/20, 501 on November 20th, 2014. There's already been a ruling with respect to my client on some of those issues, which I stipulate.

"MS. NORMAN: That makes no sense.

"THE COURT: You stipulate?

"MR. DeVRIES: I stipulate, yes.

"THE COURT: And you stipulate that you won't bring up the fact that there's—that somehow this was all to be decided by a jury in this case?

"MR. KOENIG: Correct.

"MS. NORMAN: Yes, thank you, your Honor.

"THE COURT: That's that."

We have several observations.

First, Koenig objected that any issue of attorney fees could not involve tort of another attorney fees, as that issue had been removed from the case by "501," the law and motion department presided over by Judge Quidachay.

Second, and consistent with a stipulation about attorney fees, there were issues on which attorney fees were being pursued. For example, Sam was pursuing attorney fees under the purchase agreement, and Boykin under the elder abuse statute.

Third, two days later, on January 31, during a discussion regarding Judge Quidachay's ruling, Boykin's counsel conceded that the tort of another doctrine had been

stricken: "And Judge Quidachay does agree with Attorney Koenig that we can't get attorney fees outside of commission for . . . Paragraph 15. Judge Quidachay then also discusses how you can't get tort-of-another under these certain situations. However, there are causes of action that allow for attorney's fees, and I do not read Judge Quidachay's order stating that if you can get attorney's fees under that cause of action outside a tort-of-another or outside of Paragraph 15, that you are barred from it."

Finally, on February 3, Judge Robertson ordered the fourth amended cross-complaint to be filed, and it was in fact filed February 8. If the stipulation was an agreement to allow Judge Robertson to decide the tort of another issue, there would have been no reason for the fourth amended cross-complaint.

Arguing in support of her position, Boykin relies primarily on *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624 for the proposition that we defer to Judge Robertson's interpretation of the stipulation. We will not. *Winograd* involved a stipulation to waive trial and submit to binding arbitration, a stipulation that was ambiguous. There, and unlike here, the Court's interpretation was not based solely on the language of the stipulation: "Also considered by the trial judge was evidence of conduct by counsel which, although not disputed, was subject to differing interpretations." (*Id.* at p. 633.) And "the additional evidence that the parties waived trial de novo, inquired as to discovery being cut off, questioned whether different judges could be substituted before the five-year date, set a 'binding arbitration control date,' etc., tends to indicate an agreement to a modified form of judicial arbitration, rather than an agreement to unfettered contractual arbitration." (*Id.* at p. 636.) Here, by contrast, Judge Robertson considered no extrinsic evidence.[16]

Judge Robertson's consideration of any tort of another fee claim fails on another ground, under the fundamental rule that a ruling by one judge may not be reconsidered by another judge. (*Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583,

[16] Boykin claims Judge Robertson considered "counsel's demeanors." No record reference is cited in support.

1588–1590; *Wyoming Pacific Oil Co. v. Preston* (1958) 50 Cal.2d 736, 739.) As the court admonished in *In re Alberto* (2002) 102 Cal.App.4th 421, 427: "For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court." What Judge Robertson did is not allowed. (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 630–631 [second judge without power to vacate default judgment entered by first judge]; *Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1068–1071 [second judge cannot order record unsealed after first judge ordered record sealed]; *Micro/Vest Corp. v. Superior Court* (1984) 150 Cal.App.3d 1085, 1088–1091 [second judge may not determine first judge improperly struck Code Civ. Proc., § 170.6 challenge].) Boykin cites no relevant authority to the contrary.[17]

Le Francois v. Goel (2005) 35 Cal.4th 1094, a case Boykin cites — and a case relied on by Judge Robertson—is not to the contrary. *Le Francois* involved the same judge who made the original order, and the Supreme Court held that a trial court has the inherent power to reconsider orders on its own motion "as long as it gives the parties notice that it may do so and a reasonable opportunity to litigate the question." (*Id.* at p. 1097.) And the court went on, "To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion—something we think will happen rather rarely—it should inform the parties of this concern, solicit briefing, and hold a hearing." (*Id.* at p. 1108.) In sum, before reconsidering an earlier ruling on its own motion, the court must notify the parties that it may do so, must solicit briefing, and must conduct a hearing. (*Ibid.*; *Paramount Petroleum Corp. v. Superior Court.* (2014) 227 Cal.App.4th 226, 238.)

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[17] The cases cited by Boykin include one involving a single judge reconsidering his own order: *In re Alberto, supra,* 102 Cal.App.4th at page 427; and two involving a second judge making different factual findings than the first judge based on new evidence: *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 705–706; *Lacey v. Bertone* (1952) 109 Cal.App.2d 107, 110–111. That was not the situation here.

Passing over whether Judge Robertson did all that was required of him, *Le Francois* involved a court acting "on its own motion, to reconsider *its* prior . . . orders, so it may correct *its* own errors." (*Le Francois v. Goel, supra,* 35 Cal.4th 1094, at p. 1107, italics added.) The prior order here was that of Judge Quidachay, not Judge Robertson.

The alternative ground cited by Judge Robertson is equally unpersuasive. That is, setting forth that Judge Quidachay issued a "tentative decision" that Judge Robertson quoted, Judge Robertson went on to say this: the "Registers of Action contain [*sic*] the same language. However, no order to strike was apparently ever submitted by the prevailing party and no order to strike was ever signed by the Honorable Quidachay in conformity with the tentative decision. The Court finds for the factual and legal reasons set forth herein that Tort of Another damages are plainly applicable in this case and prior rulings by the Honorable Quidachay do not preclude this decision. [¶] [Code of] Civil Procedure section 1008 limits the ability of a party's time to ask for reconsideration 'after service upon the party of written notice of entry of the order.' [Code Civ. Proc.,] § 1008. An 'order' is defined as the 'direction of a court or judge, made or entered in writing.' [Code Civ. Proc.,] § 1003 ('CCP § 1003'). The Court in *In re Marcus* stated: [¶] 'It has long been settled that the action of the court must be made a matter of record in order to avoid any uncertainty as to what its action has been. The record may be made by a written order signed by the judge and filed with the court or it may be set forth in detail in the court's minutes. But either way, a writing is essential to avoid the uncertainty that can arise when attempting to enforce an oral ruling.' [¶] *In re Marcus* (2006) 138 Cal.App.4th 1009, (citing *Von Schmidt v. Widber*, (1893) 99 Cal. 511, 515; see also *Maxwell v. Perkins*, (1953) 116 Cal.App.2d 752, 756; see also *People v. Gordon*, (1951) 105 Cal.App.2d 711, 716; see also Cal. Rules of Court, rule 2(d)(2), (3))." (Fn. omitted.)

Judge Robertson overlooked the fact that the ruling was entered in the minutes. As held in *In re Marcus, supra,* 138 Cal.App.4th 1009, a trial court's oral ruling will become effective once it is "filed in writing with the clerk or entered in the minutes." (*Id.* at pp. 1015–1016; accord, *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170;

see *Simmons v. Superior Court* (1959) 52 Cal.2d 373, 378 [entry in minutes is equivalent of signing and filing final order].)

Indeed, the leading practical treatise notes: "Formal rulings generally not required: Except for appointment of referees [citation], there is no requirement that a court make a formal, written ruling in a law and motion matter. Oral on-the-record rulings suffice to provide proper appellate review. [See *Biljac Assocs. v. First Interstate Bank of Oregon, N.A.* (1990) 218 [Cal.App.3d] 1410, 1419 . . . (disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532 . . . , fn. 8)]." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 9:180, pp. 9(I)-134 to 9(I)-135.)

The Tort of Another Award is Not Supported

An award of attorney fees under the tort of another doctrine is not attorney fees as attorney fees, but attorney fees as an item of damage. So, as *Prentice, supra,* 59 Cal.2d at page 620 put it, the person "is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." Or, as the court later explained: "[W]e are not dealing with 'the measure and mode of compensation of attorneys' but with damages wrongfully caused by defendant's improper actions." (*Id*. at p. 621; see also *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [reasonable damages are attorney fees "incurred"].) In short, "The tort of another doctrine applies to economic damages (i.e., attorney fees incurred in litigation with third parties) suffered as a result of an alleged tort." (*Mega RV Corp. v. HWH Corp.* (2014) 225 Cal.App.4th 1318, 1339.) No such fees were incurred here.

As described in detail above, Judge Robertson first asked counsel for Boykin for a "ballpark" amount of attorney fees, which they gave. Then, on February 8, giving his tentative decision, Judge Robertson said counsel would be entitled to fees "in the range of "$400,000." Two days later, Judge Robertson ordered counsel to provide "information" on attorney fees claimed, providing them a roadmap of what to provide, with specific detailed instructions.

At a February 18 hearing on the tort of another fees, Boykin's counsel sought "a reasonable and equitable rate" for their work. Judge Robertson apparently agreed: "The way the law works on this is you are supposed to determine the fair market hourly rate to start with." And he also stated, without prompting, that he intended to apply a "multiplier" to the "fair market hourly rate."

On February 18, Judge Robertson issued what he labeled his "Tentative Decision—Amount of Attorney's Fees—Tort of Another." There, he determined the "reasonable" hourly rates approved in other San Francisco Superior Court cases would be the "fair market value" of the attorneys' work, then applied a "multiplier" to those rates, concluding that $794,579 should be awarded to Boykin's attorneys.

On March 24, Judge Robertson issued his order directing Boykin's counsel to provide the court their "adorned" hourly rate, defined as "the Competitive hourly rate plus an additional factor for contingency."

On March 30, Koenig again pointed out that the law of tort of another allowed only actual damages "incurred" by the client, and that Boykin's attorneys had failed to produce any evidence that she had actually "incurred" any obligation to pay anything to her attorneys.

At no time did Boykin present any evidence that she actually incurred any obligation to pay any amount of attorney fees.[18]

On June 20, Judge Robertson issued what he called "Amended Statement of Decision Awarding Attorneys Fees as Damages to Attorneys for Defendant and Cross-Complainant Catalina Boykin Under the Tort of Another Doctrine and Determining the Amount of Such Damages." There, while purporting to pay lip service to the rule

[18] Indeed, Boykin's counsel refused to tell the court the terms of her agreement with Boykin. Unsworn, all she would reveal was "[i]t is a hybrid. I am allowed to any attorneys fees that the Court awards. . . . It is a hybrid agreement. I did have a right plus attorneys fees. I was very careful when I prepared my contingency fee agreement, and I have a right to whatever attorney's fees the Court awards." As Jenny He notes, "After this cryptic statement, one would have expected [Judge Robertson] to ask counsel to produce the agreement itself. There was no such request."

requiring "actually incurred," Judge Robertson nevertheless proceeded to calculate fees by the same method he had employed before: "The Court will determine the fair market value of the legal fees and costs that have been expended in defending against Ms. Sam's claims, which Ms. Boykin is legally obligated to pay. This amount is being awarded as damages." He went on to award $588,938 in tort of another attorney fees. But there was no evidence before Judge Robertson that Boykin had any agreement that "legally obligated her to pay" any amount of money to her attorneys, let alone one that required her to pay the "fair market value" of their services.

In light of this, Jenny He's brief asks, "How did [Judge Robertson] reach [his] conclusion?" And it answers this way: "By making up a new contract for the parties—*after* the trial, *after* the verdict, and *after* the court ruled that Ms. He had committed tort-of-another." And from there Jenny He's brief goes on to quote Judge Robertson's reasoning: "In this case, Ms. Norman had a contingency fee arrangement with Ms. Boykin, whereby Ms. Boykin agreed to pay a percentage of her recovery to Ms. Norman. On February 18, 2016, the Court asked Ms. Norman about her contingency interest and whether she would be willing to waive it in exchange for receiving an award of attorney's fees under the Tort of Another doctrine. Ms. Norman responded, 'I don't see that there would be any need for me to accept a contingency and receive these fees.' It is in the Court's recollection that Ms. Norman confirmed that she would waive the contingency in exchange for being able to recover Tort of Another attorney's fees. Accordingly, the Court finds that Ms. Norman relinquished this right to recover a contingency fee in exchange for her ability to recover legal expenses, as damages, under the Tort of Another doctrine for the hours she expended. Because of this agreement, the Court finds that Ms. Boykin is legally obligated to pay Ms. Norman for the fair market value of the hours that she has expended which are recoverable under the Tort of Another doctrine. The Court finds that such obligations arise by contract, by quantum meruit, and by equity."

That reasoning, we conclude, has no support in the record. Or in the law.

In light of our conclusions above, we need not address various other arguments raised by Jenny He and Century 21, including that the tort of another finding is inconsistent with the jury's findings, or that the amount of attorney fees awarded is excessive. We also leave undetermined the various and sundry attacks on Judge Robertson's participation here, most particularly his involvement in the settlement.

DISPOSITION

An interpretation of a jury verdict presents an issue of law subject to independent review. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 303; *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) "Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation." (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457; accord, *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960.)

The judgment ordering Jenny He and Century 21 to pay Boykin $350,021 in damages and $588,938 in tort of another attorney fees is reversed and the matter is remanded with instructions to enter a new judgment that Jenny He and Century 21 pay Boykin $17,500. Jenny He and Century 21 shall recover their costs on appeal.

_____
Richman, Acting P.J.

We concur:

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Stewart, J.

_____
Miller, J.

A149020; *Boykin v. He et al.*